

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CAROLINE CLARK

PLAINTIFF

V.

C.A. NO. A-12-CV-007-SS

AUSTIN MONTESSORI SCHOOL, INC.

DEFENDANT

**DEFENDANT’S TRIAL BRIEF
REGARDING ITS FMLA “EMPLOYER” STATUS**

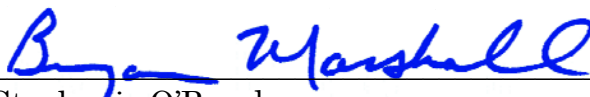
TO THE HONORABLE JUDGE OF SAID COURT:

Defendant Austin Montessori School, Inc. (“AMS”) files this trial brief regarding its FMLA “employer” status, and respectfully shows the Court as follows:

A threshold issue in this case is whether AMS employs 50 or more employees, bringing it within the FMLA’s definition of “employer.” Whether a person is an independent contractor or employee for purposes of determining whether a defendant meets the statutory definition of “employer” under the FMLA is a question of law. *Nichols v. All Points Transport Corp. of Mich. Inc.*, 364 F.Supp. 2d 621, 631 (E.D. Mich. 2005) (citing *Fegley v. Higgins*, 19 F.3d 1126, 1132 (6th Cir. 1994)). It is for the court to resolve factual issues underlying a determination of whether a defendant is an “employer” under the FMLA. *See Nichols*, 364 F.Supp. 2d at 631 n.3 (citing *Douglas v. E.G. Baldwin & Assocs., Inc.*, 150 F.3d 604, 608 (6th Cir. 1998)). Because AMS’s “employer” status under the FMLA is an issue for this Court to decide, it must be resolved before submission of the case to the jury.

Therefore, AMS respectfully asks this Court to rule on whether it is an “employer” under the FMLA.

Respectfully submitted,



Stephanie O'Rourke
Texas State Bar No. 15310800
sorourke@cbylaw.com

Bryan P. Marshall
Texas State Bar No. 24034552
bmarshall@cbylaw.com

Robert M. Smith
Texas State Bar No. 18677400
rsmith@cbylaw.com

COKINOS, BOSIEN & YOUNG
10999 West IH-10, Suite 800
San Antonio, Texas 78230

T (210) 293-8700

F (210) 293-8733

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2013, a true and correct copy of the foregoing was filed with the clerk of court for the U.S. District Court, Western District of Texas, using the electronic case files system of the court. I hereby certify that I have served the following counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

Russell Scott Cook
Melissa A. Jacobs
THE COOK LAW FIRM
919 Congress Avenue, Suite 1145
Austin, Texas 78701
ATTORNEYS FOR PLAINTIFF



Bryan F. Marshall